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Commentary

Blind Umpires—A Response to Professor Resnik

By Steven Flanders*

Professor Judith Resnik has issued a “proclamation of change”—an attack on judicial management of civil cases that asserts that the character of the judiciary has been fundamentally altered for the worse. Referring especially to the federal judiciary,1 Resnik argues that new managerial responsibilities have led many judges to abandon the disinterested stance that is the essence of the judicial role.2 In a turgid and tendentious piece of writing that is riddled with errors in both its logic and its scholarship, she appears to assert that “a classical view of the judicial role”4 has been replaced by a new set of norms that encourages judges to intrude erratically during pretrial preparation and post-trial (or post-decree) implementation.

Professor Resnik believes that new managerial responsibilities give judges greater power and, at the same time, undermine the traditional

* Circuit Executive, United States Courts, Second Circuit. B.A., 1963, Haverford College; M.A., 1965, Ph.D., 1970, Indiana University. I wish to thank Geoffrey Mort for research assistance, and the many kind people who offered comments on previous drafts. Among the latter are Chief Judge Barbara B. Crabb, Judge Morris E. Lasker, Professor A. Leo Levin, Professor Robert McKay, Thomas Olson, Chief Judge Robert F. Peckham, and Judge Alvin B. Rubin.

2. Resnik, supra note 1, at 376 n.4. See infra note 45.
3. Resnik, supra note 1, at 376.
4. Id. It is not clear from Professor Resnik’s article what the “classical judicial role” is or was, as she does not specify a “classical” time or place, or any particular set of procedures. Apparently she understands classical judges to have been disinterested and uninvolved. See id. at 376, 380-83. But see id. at 446-48 (Appendix entitled “The Iconography of Justice”). Because there are numerous references to Greece and Rome in this “iconography,” it is possible that she intends the reader to take the term “classical judges” literally.

[505]
procedural safeguards against abuse of that power.5 “During pretrial supervision, judges make many decisions informally and often meet with parties ex parte, and appellate review is virtually unavailable.”6 Judges are also “at the center” of post-trial implementation. “They are personally involved in the implementation of their decrees and in the prospective planning of post-trial relations among the parties.”7 In an excess of understatement, Resnik observes that “[u]nreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the ‘due process’ decisionmaking model.”8 She views management as a new procedural form of “judicial activism”9 that raises concerns at least as weighty as those ordinarily voiced with regard to judicial activism of the substantive sort.

Professor Resnik also believes that “judicial management may be teaching judges to value statistics rather than quality.”10 Judicial management “has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness.”11 According to Resnik, supervisory obligations give judges a “stake” in “effi-

5. Id. at 424-25.
6. Id. at 413.
While it is true that pretrial case management is almost always unreviewable by appeal in cases that do not result in a final judgment, there are important exceptions. For example, awards of attorney's fees, certification of class actions, and settlement of class actions are appealable. See Miller, An Overview of Federal Class Actions: Past, Present, and Future, 4 JUST. Sys. J. 197, 198-99 (1978). Infrequently, a settlement is reviewable on appeal. See, e.g., Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881 (2d Cir. 1983); Kline v. Wolf, 702 F.2d 400 (2d Cir. 1983).

Further, Resnik fails to mention that there has long existed the mechanism of a complaint to the appropriate circuit judicial council. See 28 U.S.C. § 332(d) (1982). It is my understanding that this mechanism, available to any victim of abuse of pretrial management power, has been relatively effective for the more than 40 years that it has existed. See generally S. FLANDERS & J. MCDERMOTT, OPERATION OF THE FEDERAL JUDICIAL COUNCILS 26-35 (1978). This mechanism has now been supplemented by the procedures of the Judicial Councils' Reform and Judicial Conduct and Disability Act of 1980. See 28 U.S.C. § 372(c) (Supp. V 1981). Mandamus review is also available. For a recent treatment, see Berger, The Mandamus Power of the United States Courts of Appeals: A Complex and Confused Means of Appellate Control, 31 BUFFALO L. REV. 37 (1982). Pretrial management, then, is reviewable by appeal, by misconduct complaint, and by mandamus.

7. Resnik, supra note 1, at 391.
8. Id. at 430.
9. Id. at 380.
10. Id. As an example, Professor Resnik cites the collection of statistics compiled by federal district judges regarding the number of cases terminated, number of motions decided, and number and type of “discrete events” supervised. She concludes that “case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal. Quantity has become all important; quality is occasionally mentioned and then ignored.” Id. at 430-31.
11. Id. at 424-25.
cient" case management, as calculated by speed and number of dispositions. "Competition and peer pressure may tempt judges to rush litigants because of reasons unrelated to the merits of disputes." These new managerial responsibilities and concerns about case loads have led judges to employ "efficiency experts who promise 'calendar control.' Under the experts' guidance, judges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible." Since I am apparently one of those "efficiency experts," I was not pleased to learn that "managerial judging may be redefining sub silentio our standards of what constitutes rational, fair, and impartial adjudication."

In this Commentary, I wish to reassure Professor Resnik's readers, as well as others who are interested in the direction of the civil litigation system. Resnik exaggerates the extent of any judicial activity that is inconsistent with due process. More important, she confuses genuinely questionable approaches, which have long been understood to be questionable and thus are rare in practice, with established practices that are generally recognized as acceptable and even essential. By muddling almost every managerial technique that a trial judge might use with the special and well-understood concerns that attend an aggressive judicial insistence on settlement, Resnik does a disservice: she suggests that all judicial case management, however unexceptionable, is inconsistent with due process or with traditional images of justice. The corresponding service that she performs—focusing attention upon important changes in the roles and responsibilities of trial judges— is largely vitiated.

12. *Id.* at 427. In support of this broad assertion, Resnik seems to suggest that a statement made by Judge John D. Butzner, Jr., at a congressional hearing on judgeship needs indicates that the judiciary gives unwarranted primacy to quantity over quality. *Id.* at 427 & n.198. This is a remarkable misrepresentation. In the rather desperate quest for additional resources in which the judiciary has recently engaged, Congress has made it clear that demonstration of effective use of existing resources is a precondition to grants of further resources. The primary subject matter of judgeship hearings is inevitably quantitative, and would be even if judges had no managerial responsibilities. For a judge or anyone else to focus on the quality of court work would be inappropriate in this context.

13. *Id.* at 379.

14. It is a title I would hardly seek out. However, I am cited at least 20 times in Professor Resnik's article. *See, e.g., Id.* at 378 n.14, 384 n.50, 399 n.100, 416 n.163; *see also id.* at 399 n.103, 404 n. 121, 431 n.217 (citations to work that I directed); *id.* at 398 (a reference to my former employer, the Federal Judicial Center).

15. *Id.* at 380.
Resnik's Hypothetical Models: Their Accuracy and Relevance

Professor Resnik's discussion of judicial case management focuses primarily upon two facets of litigation: the new imperatives and roles engendered by institutional reform litigation, and a supposed imperative to participate aggressively in settlement, perhaps by taking sides. Less controversial activities like setting schedules, controlling discovery, and adjudicating motions, also appear to be implicated.

Professor Resnik's central error is that she builds her argument on a foundation of two hypothetical "models." These models are the basis of her "description" of what she understands to be "managerial judging." This approach is disingenuous at best and is the primary target of my criticism. The models permit Resnik to rest her argument upon a factual basis that she has constructed herself, and frees her, apparently, from any responsibility to demonstrate that the real world conforms to her understanding of it. If the author demonstrated the factual accuracy of the models or their relevance to all of the judicial management techniques she criticizes, her approach might be an acceptable rhetorical device.

Resnik's models by themselves demonstrate nothing. Her attack on judicial case management fails because she provides no other evidence that case management powers are abused or have undesirable side effects. My first objective is to show that these models either are inadequate factual representations or are irrelevant, using the federal courts as my focus, as Resnik says that she does. I will then discuss why judicial case management is essential and will briefly note the benefits of various managerial devices. Finally, I will explain why the "classical" model that Professor Resnik proposes—as I understand it, a system of "blind umpires"—is neither desirable nor feasible.

17. See Resnik, supra note 1, at 388-93.
18. See, e.g., id. at 378 & n.14, where Resnik appears to cite as the subjects of her attacks on case management several works, including my own. In fact, these works are circumspect or discourage settlement activities, and primarily encourage other forms of judicial management. See infra note 37.
19. Resnik, supra note 1, at 386-87.
20. The article is filled with puzzling and meaningless statements such as "the models demonstrate . . .," see, e.g., id. at 403, and "the hypotheticals demonstrate . . .," see, e.g., id. at 411, and observations about what the hypothetical judges did or did not do and the propriety or desirability of those actions, see, e.g., id. at 425.
21. See infra note 45.
Post-trial Management in Institutional Reform Litigation

Resnik's hypothetical case of *Petite v. Governor* is a prisoner class action concerning living conditions at "Hadleyville," a state prison.\(^{22}\) The court found those living conditions to be constitutionally impermissible and ordered that they be upgraded. When defendants had failed to comply with the order two years after it was filed, plaintiffs filed a motion for contempt. Because of the state's intransigence, Judge Breaux is drawn deeply into the case in the familiar ways: she meets many times with both sides, issues several interim orders that specify necessary improvements, is forced to threaten the governor with contempt, then actually finds him in contempt once and imposes a fine of five hundred dollars per day.\(^{23}\) "No longer a detached oracle, the judge has become a consort of the litigants. Moreover, judges like the fictional Breaux become openly involved in a power struggle."\(^{24}\)

It is well known and understood that trial judges are thrust into a new role in cases in which acrimonious litigation continues for years over the implementation of a decree ordering a prison, state hospital, school, or other institution to comply with constitutional imperatives.\(^{25}\) Indeed, by its nature "post-trial" management is limited to these institutional reform settings, and thus to a very small proportion of all civil cases.\(^{26}\) These cases are so few, their circumstances so specialized, and the unique participatory role they impose on judges so well understood that it is unnecessary to do anything more drastic than find mechanisms for facilitating judges' work in these uncomfortable situations.\(^{27}\)

However, as many as thirty-two states have prisons that are or have been under court orders,\(^{28}\) and there are numerous orders and decrees regarding other kinds of institutions. It is significant that Professor Resnik believes that judges' actions in these big equity cases cast doubt on their roles in other managerial activities. Perhaps we should

\(^{22}\) Resnik, *supra* note 1, at 387.

\(^{23}\) *Id.* at 387-88.

\(^{24}\) *Id.* at 391.

\(^{25}\) See, e.g., Chayes, *supra* note 16.

\(^{26}\) Of a total of 231,920 cases pending in the federal courts as of June 30, 1983, AD. OFF. U.S. COURTS, 1983 ANNUAL REPORT OF THE DIRECTOR 241 (1983) (Table C-1), an insignificant percentage were major institutional reform cases.

\(^{27}\) A good deal has been done in this area already, especially by the Federal Judicial Center. See Nathan, *The Use of Masters in Institutional Reform Litigation*, 10 TOLEDO L. REV. 419 (1979); see also Chayes, *The Supreme Court, 1981 Term, Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 1 (1979).

\(^{28}\) AM. CIVIL LIBERTIES FOUND., NATIONAL PRISON PROJECT STATUS REPORT: COURTS AND PRISONS 1-7 (1983).
overcome our aversion to creating specialized forums, or should search for a separate approach that could serve as a lightning rod for the criticism that these cases inevitably draw. Maybe we should separate law from equity. In any event, the issues surrounding institutional reform cases are utterly separate from those of "pretrial" management. We can solve the special problems these extraordinary cases pose or fail to solve them, remove them to another forum or keep them where they are, without affecting in the least the issues of technique in managing the course of conventional civil litigation.

Indeed, having raised in some detail the spectre of post-trial managerial abuses, Professor Resnik appears to summarily discount the threat. She concedes: "Unlike pretrial management, post-trial activity occurs within a framework of appellate oversight, public visibility, and institutional constraints that inhibits overreaching. Post-trial supervision thus represents a less striking departure from the American judicial tradition than does pretrial management." The reader is left to wonder why Resnik dwells on the institutional reform cases, and to what extent her preoccupation with these exceptional cases has contributed to her distrust of other managerial activities.

Managing Case Preparation and Encouraging Settlements

The hypothetical case of Paulson v. Danforth is apparently intended to represent pretrial judicial management activities in civil cases generally. Paulson is a products liability suit arising out of an automobile crash. Following quick resolution of an early jurisdictional dis-

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30. There would be some logic in doing so as a latter day reassertion of the historical basis of the equity courts as direct representatives of the king. Indeed, critics of judges’ actions in institutional reform cases make unflattering comparisons to assertions of royal prerogatives. See, e.g., Glazer, Towards an Imperial Judiciary, 41 The Pub. Interest 105 (1975). For a discussion of the origin of equity courts, see generally I F. Lawrence, Equity Jurisprudence (1929). But whatever the problems and solutions may be, they are utterly separate from those of post-trial management in the course of conventional civil litigation.
31. See infra notes 48-59 & accompanying text.
32. Resnik, supra note 1, at 414.
33. Id. at 388.
34. See, e.g., id. at 425. Also, Resnik describes the Paulson case as “run-of-the-mill.” Id. at 386. I would not choose to describe any products liability suit in this way, and certainly not this one: the stakes are considerable and there are substantial legal and factual uncertainties.
pute, plaintiff makes a number of demanding discovery requests that are resisted and that raise numerous questions of fact and strategy. At a preliminary conference, called by Judge Kinser because the discovery motions trouble him, the judge seems to tire of the lawyers’ wrangling and suddenly presses the lawyers for a settlement. He does so in a determined fashion that includes separate meetings with each side, a suggestion that the plaintiff’s case looks “sound,” and discussion of a specific settlement figure suggested by the judge. Nothing is resolved, except that the judge defers ruling on the motions until the parties negotiate further. Another conference is set for six weeks later.35

There is no evidence that the Paulson case reflects anything other than Professor Resnik’s imagination, though I would not claim that it is so implausible that nothing like it could happen. When Resnik later addresses the issues generated from her second model, she appears to have been blinded by concerns over potential abuse of judicial powers in efforts to encourage or to force settlements—a blindness incorporated in the model.36 Were the practices of federal trial judges in settlement matters even distantly related to Resnik’s understanding of them, there might indeed be a serious problem. In fact, even the sources that she uses suggest a more reassuring picture.37 In general, federal judges are circumspect and selective in their discussions of settlement.38 It is my experience that virtually all are keenly aware of the dangers Resnik identifies, dangers that have been widely discussed and understood for many years.39

35. Id. at 388-90.
36. Although in her discussion of the Paulson model Resnik mentions other aspects of judicial management, such as discovery, it is apparent that her thesis revolves around the issue of settlement. See, e.g., id. at 390, 401-02, 406. Indeed, Resnik makes the remarkable assertion that “the whole point of pretrial management is to end the dispute as rapidly as possible.” Id. at 406.
38. See generally materials cited supra note 37.

The notion that judicial settlement conferences present special issues is hardly a new
Most judges regard their primary role in the settlement process as that of an indirect facilitator.\textsuperscript{40} It is my impression from my experience that actual settlement figures are discussed only by a minority of judges, and then only under carefully structured conditions. Noting that most cases settle or are otherwise resolved short of trial, Judge Alvin B. Rubin urges that settlement efforts by judges be highly selective and subject to the initiative of the lawyers involved.\textsuperscript{41} Even Judge

one. That notion was delightfully highlighted by Professor A. Leo Levin over 30 years ago in a review of Harry D. Nims' work of remarkably enthusiastic and undifferentiated advocacy, Pre-Trial. Published under the sponsorship of the Committee on Pretrial Procedure of the Judicial Conference of the United States and of the Council of the Section on Judicial Administration of the American Bar Association, the book seemed to favor almost any variety of pretrial activity, in a fashion that seems to foreshadow Professor Resnik's undifferentiated opposition to all judicial management. Professor Levin noted that "Mr. Nims seems so intent on getting people to use pre-trial that the kind of pre-trial they use seems no concern of his." Levin, Book Review, 37 IOWA L. REV. 136, 138 (1951) (reviewing H. NIMS, PRE-TRIAL (1950)). Professor Levin then excerpted the following astonishing colloquy, which Nims had in turn excerpted:

from the transcript of a conference in an actual case brought by a housewife to recover for injuries sustained when a bus in which she was a passenger crashed into a truck. Hospital records and doctor bills having been submitted, counsel for plaintiff stated that suit was for $7500. He then was asked by the court to leave. Brief discussion of how the accident occurred is followed by:

"Mr. Weeks: [for the truck owners] We will rest on the statement that we were struck from the rear. I will offer only a nominal sum—$100.

Mr. Justice McNally: Will you increase your offer?

Mr. Weeks: I will offer $200.

Mr. Justice McNally: Make it $250.

Mr. Justice McNally: I have reviewed the medical record, and I think the case is worth $3,000. There is no question some one or both are liable.

Mr. Cole: [for the bus company] I am disposed to follow your Honor's recommendation in this matter.

Mr. Justice McNally: I will talk to Mr. Brandt, [attorney for plaintiff]. The attorneys for both defendants step outside. Mr. Brandt re-enters."

\textit{Id.} (quoting H. \textsc{Nims}, supra, at 238-39). An auction process like this, apparently in the absence of any showing of liability, would disturb Professor Resnik, or any of us, whether or not the judge in question was actually likely to be the trial judge in the case (the judge in this case was not). It disturbed Professor Levin 30 years ago. \textit{See id.} at 139. If Resnik believes that the settlement conference is misused in the federal courts today in a way similar to Nims' case, and the facts of the Paulson case seem to indicate that she does, she should offer a basis for that belief before constructing a model to be used as a starting point for an attack on all pretrial judicial case management.

40. Judge Alvin B. Rubin, for example, took a circumspect approach to settlement when he focused a presentation to new district court judges on the elimination of uncertainty, \textit{i.e.}, the salutary effect of a definite trial date on the settlement process. PROCEEDINGS OF SEMINAR FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 135 (1976). \textit{See also} Rubin, The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts, 4 JUST. SYS. J. 135 (1978) (placing little emphasis on settlement).

41. H. \textsc{Will}, R. \textsc{Merhige} \\& A. \textsc{Rubin}, \textsc{supra} note 35, at 18-19.
Hubert L. Will, an enthusiastic advocate of routine settlement conferences, tells us that "I have never set, on my own initiative, a settlement conference." While most federal judges are alert to the risks created by their involvement in the settlement process, they also are, and must be, sensitive to the obstacles to settlement sometimes imposed by the adversary relationship. Many judges are determined to take advantage of opportunities the court may have to facilitate settlement. As Judge Will put it, "there are a lot of cases in which a settlement can be achieved only through the intervention of a third party who has objectivity, who has no stake in either side of the case, who has no prestige involved, and who is ultimately prepared to try the case if necessary." Seen in this light, judicial involvement in settlement efforts is something no sensible person could quarrel with if the dangers are handled appropriately.

Of course, I do not purport to prove that the dangers are handled appropriately in all cases. My point is that Resnik has failed to show that these dangers are not handled appropriately; she thus cannot justify her inclusion of Judge Kinser's excessive settlement involvement in the Paulson model as representative behavior.

We must also remind ourselves that encouraging settlements is a policy problem of paramount importance. In a system founded upon the adversary relationship, in which lawyers are trained to fight, not to negotiate, suggestion of settlement is often taken as a sign of weakness. A settlement is in many respects the closest thing to a truly final

42. Id. at 8.
43. Id. at 8-9.
44. Normally, a case would be sent to another judge for trial if a judge has participated as deeply in the settlement process as the Paulson case's Judge Kinser did—itself an unlikely event in my experience.
45. Professor Resnik's failure here is exemplified by the confusion stemming from her curious research methods. She claims to speak primarily, even exclusively, about federal practice, yet much of the evidence adduced concerning judicial settlement efforts and activity comes from a single source that describes a state procedure 15 years ago in a single jurisdiction. See, e.g., Resnik, supra note 1, at 399 n.106. Resnik's confusion may be due to the fact that the author of that single source, Aldisert, A Metropolitan Court Conquers Its Backlog, 51 JUDICATURE 247 (1968) (cited in Resnik, supra note 1, at 379 n.18), is presently a federal judge on the United States Court of Appeals for the Third Circuit. While a judge of the Allegheny County Court of Common Pleas in Pittsburgh, Pennsylvania, Judge Aldisert helped to develop pioneering techniques to deal with court congestion. Though active in matters involving training and policy making within the federal courts, Judge Aldisert has never advocated—to my knowledge—settlement activities in the federal courts that could serve as the basis for Resnik's Paulson model.
46. See, e.g., Address by Derek Bok, President of Harvard University, at the Association of the Bar of the City of New York Annual Benjamin Cardozo Lecture (Nov. 9, 1982), reprinted in 38 REc. A.B. CITY N.Y. 12 (1983).
judgment that can emerge from litigation. A settlement is not normally appealable, and it normally embodies a commitment by the parties to work together in some manner, a stance that may forestall future litigation. Thus, while Professor Resnik is correct in reminding us that judicial settlement efforts can get judges into trouble and that not all settlement approaches work, it does not follow that efforts to encourage and achieve just settlements should be rolled back or even slowed down. In any event, Resnik's unsupported misconceptions of the nature and scope of judicial involvement in the settlement process in the federal courts renders her second model as useless as her first model, if not more.

The Core of Managerial Activism

As I deny that Professor Resnik accurately describes what "managerial judges" do, it must fall to me to correct the picture. Why, and in what ways, do federal judges commit their valuable time to the "management" of cases before them? I submit that the subjects of Resnik's two models, institutional reform cases and aggressive settlement efforts, are marginal examples of management activity. There are relatively few institutional reform cases, and few judges use aggressive settlement tactics. Working in a complex world that yields many different types of cases, federal judges have established appropriately diverse procedures that are individually tailored to accommodate different circumstances and policy preferences, as well as local legal practices and expectations. These practices include: 1) mechanisms to screen cases early for jurisdictional or recusal problems; 2) tailor-made schedules that will bring each case to the earliest possible resolution; 3) close supervision

47. Professor Resnik correctly observes that "empirical moorings are wanting; no data firmly support the conclusion that judicial intervention results in more settlements than would otherwise have occurred." Resnik, supra note 1, at 421. By again focusing on settlement, Resnik ignores the fact that advocates of judicial management avoid settlement activity partly because it can be a questionable use of time. See supra notes 40-41. She asks: On any given day, are four judges who speak with parties on sixteen lawsuits and report that twelve of those cases ended without trial more "productive" than four judges who preside at four trials? Is it relevant to an assessment of "productivity" that three of these four trials are settled after ten days of testimony? Resnik, supra note 1, at 422. I would suggest, incidentally, that these hypothetical numbers are unrealistic, and weighted against the productivity benefits of settlement efforts. It would be unthinkable for a judge devoting an entire day to settlement efforts to deal with only four cases; forty would be closer to the mark.

48. What follows is drawn largely from data and personal experience that I have reported on previously. See S. FLANDERS, supra note 37, at ix-xi, 17-41; see also Flanders, Case Management in Federal Courts: Some Controversies and Some Results, 4 JUST. SYS. J. 147 (1978). These works are cited repeatedly by Professor Resnik.
of discovery\footnote{This is in response to what is probably the most widespread and urgent policy concern today about the way that the litigation system functions. See \textit{Fed. R. Civ. P.} 26 Notes of Advisory Committee at 70-79 (1982); P. Connolly \& M. Kuhlman, \textit{supra} note 37, \textit{passim}; \textit{Nat'l Comm'n for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General} 41 (1979); Liman, \textit{Remarks at the Annual Judicial Conference of the Second Circuit, May 8, 1981}, 93 \textit{F.R.D.} 675, 715-19 (1982).}; and 4) the well-known components of rule 16 of the Federal Rules of Civil Procedure, before its recent modification,\footnote{Rule 16 was amended as of August 1, 1983. The amendments entail a number of revisions, two being of primary importance. First, the amendments introduce the concept of a preliminary pretrial conference to discuss the disposition of pending motions, formulation of the issues, and like matters. The provisions in old rule 16 for a final pretrial conference to formulate a plan for trial are left intact. Second, the amendments in effect make the process of pretrial case management a mandatory one in federal district courts. See \textit{Fed. R. Civ. P.} 16 (Discussion Draft 1982).} that bear on the scope and conduct of the trial.

In summarizing the diverse mechanisms used by judges and their staffs in the management of civil cases, one should distinguish the complex cases (\textit{e.g.,} many securities, patent, or antitrust cases, and class actions) from the more routine contract disputes, personal injury matters, and small-scale disputes involving government agencies (\textit{e.g.,} social security and tax cases) that predominate in the ordinary litigation environment. Both complex and routine cases are managed extensively, but different mechanisms are involved.

The complex suit normally gets substantial individual attention from judges and their staffs, who vigorously try to keep the scope of the lawsuit manageable. A tight schedule is set and maintained, though it may be frequently adjusted. There may be many conferences, and perhaps dozens of formal rulings, as the focus moves from the pleadings (Who's in the case? Is there a case? If not, could there be? What court, if any, has jurisdiction?), to discovery (What's relevant? What's privileged? What \textit{are} the issues, anyway?), to resolving the case by settlement, motion, or trial. The less complex case will get more routinized treatment, subject to adjustment in light of subsequent events. Normally a schedule is established early, sometimes at a preliminary conference, more often by the judge, courtroom clerk, or magistrate acting alone.\footnote{Some activity along these lines is now mandated by amended rule 16. See \textit{supra} note 50. Professor Resnik muddles her discussions of this type of managerial activity because she calls the early scheduling orders mandated by amended rule 16 "pretrial orders." See, \textit{e.g.}, Resnik, \textit{supra} note 1, at 401. Ordinarily I would not carp about her choice of words, in the belief that she is free to call anything that she wishes a pretrial order. However, her argument at this point is only apposite if it is taken as referring to something more substantial than a piece of paper with four or five dates on it, which as I understand it is all the amendment requires. A case that is in the uncertain status of \textit{Paulson v. Danforth} would} Time limits are set for completing discovery, holding a final
pretrial conference, and trial. Typically, few problems arise that require court intervention.

An additional dimension of managerial activism in both complex and "routine" cases is the manner and extent of a judge's use of the array of control mechanisms provided by the Federal Rules of Civil Procedure, mechanisms that normally must be initiated by a party and not the judge.52 Further, the class action under rule 23 involves the judge in several crucial managerial decisions.53 The broad judicial responsibilities established by these rules indicate that they were not designed to implement a model of the judicial role that contemplated the judge knowing nothing before trial of the parties' strategies, theories, past dealings with one another, or underlying facts.

These management mechanisms generally present few problems relevant to Professor Resnik's concerns,54 and it is no mystery why judges and their staffs believe these tools are essential.55 Substantial data indicate that a modest degree of control greatly reduces the time during which a case is pending.56 Consider, for example, the following

52. These include sanctions, summary judgment, attacks on the pleadings, and arrangements for fact-finding by a special master.

53. These include class certification and approval of settlements. See generally Miller, supra note 6.

54. These mechanisms have nothing to do with post-trial management or settlement pressures.

55. There is some mystery to Professor Resnik, however. She holds the curious notion that doctrines supporting trial court case management somehow owe their antecedents to appellate court management issues and developments. See Resnik, supra note 1, at 417-18. I know of no evidence that supports Resnik's assertion, and she does not provide any evidence. If anything, I would say that the opposite is true. Resnik disregards the obvious tradition that does exist, beginning with the concerns about expeditious procedure that led to the promulgation of the Federal Rules of Civil Procedure in the first place, see, e.g., Clark & Moore, A New Federal Civil Procedure, 44 YALE L.J. 387 (1935), continuing through the vigorous activity to extend and encourage the use of pretrial mechanisms, see S. Flanders, supra note 37, at 147-50, and leading to the more recent institutional efforts of the Federal Judicial Center, the General Accounting Office, and the Judicial Conference of the United States, see, e.g., P. Connolly & A. Lombard, Judicial Controls and the Civil Litigative Process: Motions (1980) (part of the Federal Judicial Center's District Court Study Series); Gen. Acct. Off., Better Management Can Ease Federal Civil Backlog: Report to Congress of the Comptroller General of the United States (1981); Report of the Proceedings of the Judicial Conference of the United States 12-14 (1982).

56. Professor Resnik has considerable difficulty handling data on court operations.
First, she makes a great many mistaken references to data that are or are not available. She asserts, for example, that “[b]efore 1904, no nationwide information was kept about the number of civil cases filed in federal court.” Resnik, supra note 1, at 416 n.161. This would be news to Professor Landes and Judge Posner, who have made inventive use of the reports of the Attorney General that were prepared annually in the 19th century. See, e.g., Landes & Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & ECON. 283 (1976). Despite the frequency of quasi-quantitative language in her article (e.g., “tally,” “sometimes,” see Resnik, supra note 1, at 405-406), Resnik ignores the massive data resources found in the Annual Report of the Director of the Administrative Office of United States Courts. This and related publications answer questions suggested but not dealt with throughout her article.

Resnik cites testimony by a chief judge about his own court in support of the proposition that “statistics indicate that the interval from filing to appeal has decreased in most circuits.” Resnik, supra note 1, at 418 (quoting Chief Judge Wilfred Feinberg). Although her point here is not clear, it appears she is concerned about disposition times for appeals. Most United States Courts of Appeals are slightly slower than they have been in either the recent past, see, e.g., MANAGEMENT STATISTICS IN UNITED STATES COURTS 15 (1983) (for the years 1978-1983), or the more distant past, see, e.g., AD. OFF. U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR Table B-4 (1953, 1963, 1973, 1983, or intervening years).

Professor Resnik misreads Professor Lawrence Friedman’s The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America, 39 MD. L. REV. 661 (1980), as questioning in some fashion relevant to her concerns whether real litigation rates have increased. See Resnik, supra note 1, at 396 & n.85 (citing Friedman, supra, at 363). Since Resnik directs her concern almost exclusively to the federal courts, it would have been helpful for her to note Friedman’s observation, made one page before the point that she references, that “[o]ne thing is clear: litigation, and litigation rates are rising in federal courts . . . absolutely and relative to population.” Friedman, supra, at 662. Resnik makes a similar error when she quotes a reference by Professor Friedman to his state court statistics as though his observations were relevant to “difficulties in interpreting the statistics provided by the Administrative Office [of the United States Courts].” Resnik, supra note 1, at 419 n.175.

At several points Professor Resnik confuses settlement efforts, and settlements, with the substantial number of cases that are disposed of by either motions for summary judgment or motions that attack the pleadings. For example, she quotes “warnings” about the dangers of coerced settlement and adds what she intends as an example, a reported decision that reversed a district judge who had granted summary judgment. Id. at 402 n.115 (discussing Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977))). Whatever this case is an example of, it has little to do with coerced settlement. She writes elsewhere as though she believes that every case that does not reach trial is settled. See, e.g., id. at 385 n.53, 405 (“eighty-five to ninety percent of all federal civil suits end by settlement”). But see id. at 405 n.127 (indicating some understanding of the situation). Of approximately 3000 civil cases in six districts that were surveyed and coded for the District Court Studies Project of the Federal Judicial Center, 32.2% were disposed of by motion. P. CONNOLLY & A. LOMBARD, supra note 55, at Table 23. Since the percentage of civil cases reaching trial has not reached 10% in recent years, we can conclude that no more than about 60% of all federal civil cases are settled.

Professor Resnik incorrectly paraphrases the chief judge of my own circuit as indicating that his court “decided virtually all appeals within six months of submission.” Resnik, supra note 1, at 418 & n.171 (citing Additional Judicial Positions: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 62 (1981) (statement of Chief Judge Wilfred Feinberg)). The statement in question referred to the time from filing. Although this is a difference of only a single word, the result is a difference of a factor of...
nated in six large courts in 1975. Table 1 shows the six courts studied; they appear in rough order of degree of managerial activism utilized, as described above.

### TABLE 1

**Overall Disposition Times**

<table>
<thead>
<tr>
<th>Court</th>
<th>All cases sampled</th>
<th>Routine personal tort</th>
<th>Routine contract</th>
<th>Complex contract</th>
<th>Constitutional law</th>
<th>Prisoner petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Median (days)</td>
<td>Median (days)</td>
<td>Median (days)</td>
<td>Median (days)</td>
<td>Median (days)</td>
<td>Median (days)</td>
</tr>
<tr>
<td></td>
<td>Number (cases)</td>
<td>Number (cases)</td>
<td>Number (cases)</td>
<td>Number (cases)</td>
<td>Number (cases)</td>
<td>Number (cases)</td>
</tr>
<tr>
<td>S.D. Fla.</td>
<td>121</td>
<td>595</td>
<td>202</td>
<td>53</td>
<td>139</td>
<td>119</td>
</tr>
<tr>
<td>C.D. Cal</td>
<td>166</td>
<td>541</td>
<td>323</td>
<td>41</td>
<td>176</td>
<td>48</td>
</tr>
<tr>
<td>D. Md.</td>
<td>223</td>
<td>502</td>
<td>291</td>
<td>98</td>
<td>205</td>
<td>57</td>
</tr>
<tr>
<td>E.D. La.</td>
<td>313</td>
<td>494</td>
<td>341</td>
<td>200</td>
<td>305</td>
<td>19</td>
</tr>
<tr>
<td>E.D. Pa.</td>
<td>352</td>
<td>497</td>
<td>400</td>
<td>183</td>
<td>254</td>
<td>58</td>
</tr>
<tr>
<td>D. Md.</td>
<td>500</td>
<td>468</td>
<td>689</td>
<td>113</td>
<td>331</td>
<td>46</td>
</tr>
</tbody>
</table>

For a subset of the same data base, Table 2 shows the experience of individual judges, without regard to the court the judge served on. This table treats only cases for which some discovery was done.

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possibly as much as 18, as the median time from submission to decision for the year in question was 10 days. Filing of a notice of appeal in a district court is, of course, the event that initiates an appeal. Submission, which follows preparation and filing of all briefs and nearly all motions, is the date of oral argument or of submission for a decision on the briefs. 


57. S. FLANDERS, supra note 37. This work is only one example of a long effort by the judiciary to determine the effects of alternative procedures and to keep track of different types of cases individually. Professor Resnik makes numerous assertions that this practice is new, suggesting, for example, that only now has the judiciary achieved "enhanced accountability." Resnik, supra note 1, at 416. On the contrary, in 1940 the Judicial Conference of the United States required all federal district judges to prepare a quarterly listing of cases and motions under advisement for 60 days or more. These reports have since been used regularly by the judicial councils of the circuits. Indeed, what was known—significantly—as the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts, headed for much of the 1940s and 1950s by Will Shafroth, was the source of a series of initiatives during those years to encourage effective case management. It is interesting to note that the statistics system itself was largely based upon earlier work of the Chairman of the Judicial Conference Committee on Statistics from 1946 to 1958, Judge Charles E. Clark. Judge Clark, of course, was a prime author of the federal rules themselves when he was Dean of the Yale Law School. See Clark & Moore, supra note 55. The joint stewardship of Judge Clark and Mr. Shafroth was highly productive—so the close identification of statistics with procedural studies is hardly new.

58. S. FLANDERS, supra note 37, at 19.

59. P. CONNOLLY & M. KUHLMAN, supra note 37, at 68.
TABLE 2
Total Disposition Time by Extent of Judge Control and by Disposition Type
(Average Days)

<table>
<thead>
<tr>
<th>Disposition Type</th>
<th>Judges Using Strong Controls</th>
<th>Judges Using Limited or No Controls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled</td>
<td>366</td>
<td>682</td>
</tr>
<tr>
<td>Tried</td>
<td>472</td>
<td>945</td>
</tr>
</tbody>
</table>

These tables show extraordinarily wide differences as a result of case management and indicate that delay in civil cases is substantially controllable. Professor Resnik, unfortunately, makes little or no effort to respond to these or other data on this point, though she uses their sources a great deal.60

As a final point, it is worth noting that there is a substantial demand by the bar for managerial activism on the part of judges and their staffs.61 When the Advisory Committee on Planning for the District Courts of the Second Circuit Judicial Council recently examined case management procedures in that circuit, it concluded:

Indeed, among the attorneys we interviewed, there was general agreement that a judge should play an active role in the litigation process. Perhaps even more strongly than judges, many of the attorneys stressed the importance of early and aggressive judicial intervention, noting that without continual prompting and monitoring by

60. Since Professor Resnik does not indicate why she ignores the evidence in the sources cited supra note 37, I have no basis for undertaking a response. I will speculate, for the benefit of my social science colleagues, about the contours of a methodological debate that she may have engaged me in, and suggest the following.

Those studies, which Professor Resnik correctly notes were relied upon by the Advisory Committee on Civil Rules as well as several of her other sources, were designed with the understanding that rigorous and controlled experimentation is sometimes impractical in the trial court environment. The effort, rather, was to determine and inventory the management principles that distinguish the courts that have particularly speedy disposition times or particularly high rates of terminations per judge, from those courts that are particularly slow or have low rates. We found that while the results varied widely, it was not hard to identify common elements.

Without attempting to summarize the findings here, I will state that they indicate the success of the kinds of management I have noted to be common, though not the kinds that Professor Resnik directly criticizes, such as settlement pressure. Whatever the methodological imperfections of an admittedly imperfect approach, it must be presumed that the procedures of the fast/efficient courts effectively contribute to this speed or efficiency. The burden, then, must rest on others to show that these results are fortuitous or otherwise wrong, or to show that they are harmful. Resnik, for all her criticism, fails to assume that burden. I am satisfied, as many are, that these procedures improve quality. See, e.g., S. Flanders, supra note 37, at 68-70.

61. See supra note 48.
the judge, the pretrial stage of most cases would drag on indefinitely.\textsuperscript{62}

It is telling that the practitioners who are paid to zealously protect the rights and interests of their clients do not share Resnik's fears.

**Why We Cannot Have Blind Umpires**

Professor Resnik, it appears, seeks a return to what she calls a "classical view of the judicial role," a system in which judges know little or nothing of the cases they try.\textsuperscript{63} She is far more radical than she imagines in suggesting so thorough a re-assertion of an "umpireal" role,\textsuperscript{64} or what I call a system of blind umpires. Even if trial judges are removed from all the components of case management that are discretionary, they will be far from uninformed. In a criminal trial, they will know a great deal about any evidence that was suppressed. In a class action, they will be familiar with the strategy and financing of the suit, as well as the hidden agendas the lawyers may have. In many cases, earlier decisions they have made regarding injunctions, motions to strike, and motions for summary judgment will have informed them substantially. It is hard to believe that Resnik means for us to do away with all of these devices along with the discretionary devices. Even should she desire merely to move them to another judge, this would be no solution because many cities have only one federal judge available at a particular time.

The desire for a naive judge is not only fantasy, it is foolish. On the bench, the trial judge must rely on broad knowledge of the action at bar. For example, I am told that the most common issue in evidentiary rulings is relevance.\textsuperscript{65} Ruling requires knowledge of the lawyers' strategies, and the full contour of the case being developed. There simply is no reason to impoverish the judicial process by vain pursuit of an ideal that Professor Resnik believes once obtained in our past.


\textsuperscript{63} See, e.g., Resnik, supra note 1, at 424-36.


\textsuperscript{65} Personal conversation with Chief Judge Barbara B. Crabb, Western District for Wisconsin, April 12, 1983. I am indebted to Chief Judge Crabb for the view put forward in this paragraph generally.
Oddly, Professor Resnik overlooks a very convenient model for radical change along these lines that might be worth exploring. The Master system in England, described by Professor Linda Silberman, appears to offer the isolation of trial from “improper” influences that Resnik desires, in combination with firm court control over each lawsuit. Though Silberman shows that the responsibilities of Masters differ greatly from their closest American analogue, the federal magistrates, it may be that she has identified a basis for radical reform. Possibly a refashioning of the magistrate system along English lines would accomplish some of Resnik’s purpose. Since it is a reform I would oppose for reasons that I have given already, however, I am not the one to explore this in detail.

Professor Resnik has done her readers a modest service by reminding them of certain well-known problems in judicial case management. There may be pernicious pressures due to judges’ concern about staying abreast of heavy case loads. Energetic judicial involvement in settlement negotiation and frequent pretrial contacts on the part of judges do pose certain dangers. These are indeed important issues. But Resnik does her readers a remarkable disservice by overstating one problem and lumping together all forms of judicial case management.

66. Silberman, Masters and Magistrates—The English Model, 50 N.Y.U. L. REV. 1070 (1975). Resnik cites the Silberman piece in a footnote, but does not address the proposal. See Resnik, supra note 1, at 436 & n.239.

67. I have heard judges say that the purpose of the trial court is the search for truth, while the purpose of the appellate court is the search for error. Regrettably, my present task seems to have demanded a bit of the latter activity, as Professor Resnik’s article is riddled with instances of muddled logic, misreading of sources, and misunderstanding of the issues treated.

In addition to those errors already noted, she coins the term “repeat adjudicators” for judges who handle fact-finding in cases in which they have participated in pretrial management. Resnik, supra note 1, at 429. Here again, Resnik is free to use whatever term she wishes. For her justification, id. at 429 n.208, however, she draws upon Professor Galanter’s interesting but irrelevant work on repeat litigants, Why The “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & Soc’y REV. 95 (1974). With repeat litigants, of course, the point is that they have special advantages in the litigative process as a result of their bargaining power because they are involved in many other cases, past, present, and future, that must be kept in mind as they develop strategy for any present case. Resnik is concerned with “repeat” experience in one case, Galanter with the very different matter of repeat, cumulative experience over many cases.

Professor Resnik also makes a serious error of logic in her use of the cliche that the lawyer who handles his own case “has a fool for a client.” Resnik, supra note 1, at 426. To Resnik, this somehow offers a basis for arguing that judges are not qualified to determine policies in their courts. Of course a judge who handled his own case, as trial judge or in any other way, would have for a client not only a fool but a candidate for impeachment. Presumably, Resnik has in mind a very different assertion that is in no way implied by the “fool for a client” locution. She means to argue, I take it, that judges are not well qualified
This confusion causes Resnik's models to be fatally flawed and renders her attacks based on these models marginally useful at best. The steady expansion of judicial case management since the original adoption of the Federal Rules of Civil Procedure has certainly added new components to the judicial role. But it has yet to be shown that judges have abandoned any essential attributes of their judicial role as they help manage the pace and cost of litigation.

in principle to formulate policy regarding management of their own professional activities. I am not aware of any persuasive argument to this effect; indeed, such an argument would be contrary to what most understand to be the very nature of professional activity. See generally E. Friedson, Doctoring Together: A Study of Professional Social Control (1976); W. Moore, Professions: Roles and Rules (1970); W. Scott, Organizations: Rational, Natural and Open Systems (1981). She offers no reason to disturb the belief held by many of us that judges are uniquely informed by experience (prior to appointment and on the bench), personal refinement of their individual procedures, and policy contacts with practitioners at judicial conferences and bar conferences, to develop and refine the management of the very complex and diverse institutions over which they preside. While judges (or practicing lawyers and scholars) may benefit from cross-fertilization from other professions, there is certainly no dearth of outside advice and experience in management of the federal judiciary. The work of the present author is only one indication of this.